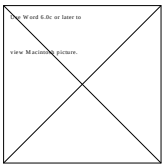

Order 97-3-34
Posted: March 21, 1997
Served: March 27, 1997

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 21st day of March, 1997

Joint Application of **AMERICAN AIRLINES, INC.** **and** **BRITISH AIRWAYS PLC** **for approval of and antitrust immunity for alliance agreement**	**Docket OST-97-2058**
Applications of **AMERICAN AIRLINES, INC.** **BRITISH AIRWAYS, PLC** **for exemptions, certificate authority, undocketed foreign air carrier permit authority, and statements of authorization**	**Dockets OST-97-2054** **2055** **2056** **2057**
Motion of **UNITED AIR LINES, INC.**	**Docket OST-96-1850**

for an order instituting an investigation and inviting comments

ORDER

I. Summary

The Department has determined that it is in the public interest to commence processing the alliance application and related authority requests concurrently with the ongoing bilateral Open-Skies negotiations with the United Kingdom. This does not constitute a change in our policy and practice of requiring an Open-Skies agreement as one predicate to approving and granting antitrust immunity to an alliance application, even where that alliance is otherwise procompetitive. We are accordingly denying the motions of Delta and TWA to delay processing some or all applications until such an agreement is in hand. In taking these actions, the Department is not making a determination that the application in Docket OST-97-2058 is substantially complete within the scope of 14 CFR 303, Subpart E, and we therefore are not yet establishing further procedures or deadlines.

By this order the Department (1) dismisses the motion of United Air Lines for an investigation in Docket OST-96-1850 to the extent inconsistent with this order, (2) denies the motion of Delta Airlines for a stay of all formal procedures in connection with the applications filed by the Joint Applicants in the above-captioned dockets, and (3) denies the motion of Trans World Airlines for dismissal of the applications for authority filed in Dockets 0ST 97-2054 through 97-2057, and the request for a Statement of Authorization to engage in code-sharing.

II. Procedural History

On January 10, 1997, American Airlines ("American") and British Airways ("BA") (hereinafter "Joint Applicants") filed in Docket OST-97-2058 an application for approval of and antitrust immunity for an “alliance agreement” (referred to also as “the Alliance”) under 49 U.S.C. §§ 41308 and 41309.[1] The Joint Applicants also filed

[1] The application defines the “alliance agreement” to include the June 11, 1996 agreement to develop and carry out the alliance, any implementing agreements concluded pursuant to that agreement, and any subsequent agreements or transactions by the Joint Applicants pursuant to such agreements. In broad terms, the Alliance contemplates (1) coordination, through a joint venture or otherwise, of all passenger and cargo services that the two carriers operate between the U.S. and the European region and beyond, with profit sharing on North Atlantic Alliance services, (2) code-sharing across each party’s global networks where permitted by governmental authorities, and (3) worldwide reciprocity for mileage credit accrual and travel award redemption between frequent flyer programs of the Joint

a motion under Rule 39 of the Department's regulations, 14 CFR § 302.39, for confidential treatment of documents submitted in support of that application. Concurrently, American and BA filed applications in Dockets OST-97-2054, 2055, 2056, and 2057 for exemption and certificate / permit authority, to operate between the United States and the United Kingdom and beyond to numerous third countries, as well as an undocketed joint application for statements of authorization to code-share between those points.

On October 9, 1996, three months before the Joint Applicants filed their application, United Air Lines ("United") filed a motion in Docket OST-96-1850, requesting us to institute an investigation of the American-BA Alliance. Before the end of October, Delta Air Lines ("Delta"), and Trans World Airlines ("TWA") answered in support of this motion and Continental Airlines ("Continental") opposed.

On January 14, 1997, four days after the Joint Application was filed, Delta filed a motion for a stay of all formal procedures with regard to the various applications. Answers supporting Delta's motion were filed by Continental, Federal Express Corporation ("Federal Express"), Northwest Airlines ("Northwest"), TWA, the National Air Carrier Association ("NACA"), the Air Line Pilots Association ("ALPA"), and the Houston Parties; the Joint Applicants answered in opposition. On January 22, 1997, TWA filed a motion to dismiss without prejudice the applications in Dockets OST-97-2054, 2055, 2056, and 2057, which the Joint Applicants answered in opposition.

III. Statutory and Public Policy Requirements

The statutory provisions governing the Joint Applicants' requests for approval and antitrust immunity are 49 U.S.C. §§ 41308 and 41309. Section 41309 authorizes us to approve agreements involving international air transportation. To approve such an agreement we must find that the agreement is not contrary to the public interest and not in violation of the statute. We also may not approve an agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits and we find that those needs or benefits cannot be obtained by any reasonably available alternative that is materially less anti-competitive. The public benefits can include international comity and foreign policy considerations.

Section 41308 authorizes us to grant antitrust immunity to an agreement approved under section 41309 if we find that immunity is required by the public interest. Unless an approved agreement substantially reduces or eliminates competition, we usually withhold antitrust immunity as being unnecessary. However, if there is a strong showing on the record that antitrust immunity is required by the public

---

Applicants. The Alliance does not involve any exchange of equity or other forms of cross-ownership. Application, at 1-4.

interest and that the parties will not proceed without it, we may nonetheless grant immunity to permit the transaction to go forward.

We have given approval and antitrust immunity to several alliances between a U.S. airline and one or more foreign airlines, where we found that the particular alliance would promote competition and offer improved service to travelers. [2]

Under our established policy and practice, we will not grant approval and antitrust immunity without an Open-Skies regime that includes an Open-Skies agreement encompassing essentially all of the elements of the U.S. Model Open-Skies Agreement. We reaffirm that policy and practice here. We are unwilling to approve and immunize an alliance if other airlines are unable to provide effective competition to the alliance partners. This policy is directly relevant here, for U.S. airlines have had little or no opportunity to enter or expand service at London's Heathrow airport, British Airways' hub, due to policies applied by the United Kingdom. Obviously, we could not grant approval and immunity for the Joint Applicants' alliance unless other U.S. airlines could compete effectively in the markets affected by the Alliance, since otherwise the Alliance would not be in the public interest.

IV. United's Motion to Institute Investigation

A. Pleadings

Given the ongoing reviews by British and European Union ("E.U.") authorities, United requests the Department to initiate its own investigation of the Alliance, and suggests that the investigation should be completed before further negotiations with the United Kingdom. United believes that the E.U. and the British authorities have their own concerns and that the results of their reviews may be at variance from each other, and not necessarily reflect U.S. interests. According to United, airport slots and access to airport facilities in the U.S. and the U.K. represent issues that we should be considering. United believes that the United States will lose control of the negotiating and regulatory processes if we do not begin our own review.

The three answering parties filed their pleadings in late October, well before the Joint Application was filed; this timing is reflected in their comments. Continental argues that it would be premature to commence any investigation, and recommends that we defer any review of the Alliance until competitive access to Heathrow is assured for Continental.

Delta regards the immunity issue as premature, but finds merit in a formal investigation of the serious competitive issues raised by the Alliance, before

---

[2] *E.g.*, Northwest-KLM (Order 93-1-11), Delta-Swissair/Sabena/Austrian (Order 96-6-33), and United-Lufthansa (Order 96-5-27).

resuming bilateral negotiations. Delta suggests collecting data on the Alliance's competitive implications, and argues that, while the immunity issue is not yet ripe, a formal investigation would assist the Department in formulating a position for further bilateral negotiations.

TWA argues against further negotiations without a comprehensive understanding of the Alliance, suggesting that the kind of operations contemplated by the Alliance raise unusual competitive issues. Like Delta, TWA distinguishes an investigation from consideration of granting immunity to the Alliance partners, and suggests directing the same questions to the Alliance as were put to the American/TACA partners.[3]

B. Decision

United's motion is largely mooted by our action in this order. With the filing of the Joint Application, the need for a separate investigation disappears; rather, the issues that United has identified in its motion will be examined, to the degree necessary, in the course of processing the Joint Application. Moreover, the Joint Application has triggered our own review, where we can apply U.S. perspectives to consideration of the Alliance, as United suggested. To the extent that the parties' other concerns remain relevant—for example, on the timing of the proceeding—they are addressed in the context of Delta's motion, discussed below.

V. Delta's Motion to Defer Procedural Dates

A. Pleadings

On January 14, 1997, Delta filed a motion requesting a stay of all formal procedures in connection with the captioned applications until the later of (1) execution by the U.S. and the U.K. of a new bilateral agreement providing for both *de jure* and *de facto* Open Skies, and (2) completion by the Department of Justice of its analysis and recommendations with respect to the proposed Alliance. Delta also requests that, in any event, a period of at least 45 days be allowed from the service date of any order providing for access to the Rule 39 documents submitted by the Joint Applicants to permit interested parties to file comments on the Alliance and/or answers to the other applications.[4]

According to Delta, formal consideration of the captioned applications should not be initiated "in light of well-settled Department policy not to consider the grant of antitrust immunity in the absence of both *de jure* and *de facto* open skies between the

---

[3] Answer of TWA, at 4,*citing* Order 96-9-15, served September 13, 1996.

[4] Delta further requested that "a common answer period" be established for all of the related American and BA applications.

U.S. and the U.K."[5] The carrier contends that third parties and the Department should not be required to speculate as to the elements of such an agreement at this stage of the negotiations, nor should they presume the attainment of *de facto* Open Skies, which in Delta's view would necessarily include "iron clad guarantees that U.S. carriers will have access to sufficient numbers of commercially-viable slots and airport facilities at Heathrow to enable them to initiate new competitive U.S.-Heathrow service." At the same time, Delta suggests that the Department and the Department of Justice should each "begin . . . an investigation of the serious competition and public policy issues raised by the proposed alliance and receive comments thereon" in order to refine the issues for further bilateral negotiations. Finally, Delta states that in no event should interested parties be required to file responses to the various applications until they have been afforded access to, and an adequate opportunity to review, the confidential documents submitted by the Joint Applicants.

Answers in support of Delta's motion were filed by Continental, Federal Express, Northwest, TWA, United, ALPA, NACA, and the Houston Parties. In general, the answers emphasized the Department's "strong policy" that it will not consider applications for antitrust immunity until an Open-Skies agreement is in place, noting that no previous alliance immunity application was submitted to the Department before an Open-Skies agreement was signed.[6] Most of these answers also stressed that the proposed Alliance cannot be evaluated adequately until it is certain that the new agreement with the U.K. is fully open in fact as well as on paper.[7]

The Joint Applicants filed an answer in opposition to Delta's motion and a joint response in opposition to the other answers.[8] In their answer to Delta, the Joint Applicants assert that there are no policy reasons to justify the requested delays. They first contend that, since the various applications were filed assuming the existence of an Open-Skies agreement meeting U.S. objectives and with the explicit understanding that approval of the Alliance application is contingent on conclusion

---

[5] Motion, at 4-6,*citing* Orders 96-7-21 at 18 and 96-5-38 at 16, in the American-CAI alliance proceeding; speech of Secretary Federico Peña introducing the Department's International Aviation Policy Statement before the Committee on Commerce, Science and Transportation, July 15, 1995, at 13-14; and speech of Deputy Assistant Secretary Patrick V. Murphy before the 68th Annual American Association of Airport Executives Conference at Las Vegas, Nevada, June 11, 1996, at 14.

[6] *E.g.*, Northwest-KLM (Order 92-11-27), Delta-Swissair / Sabena / Austrian (Order 96-5-26), and United-Lufthansa (Order 96-5-12).

[7] Continental, TWA, ALPA, and NACA cite the need for guarantees that there would be adequate slots and ground facilities at Heathrow as a precondition for considering the alliance application; Federal Express cites the need for a negotiated agreement granting full, unfettered, cargo rights; and NACA states that new entrants must be authorized to serve in advance of any approval of the alliance.

[8] The joint response was accompanied by a motion for leave to file an unauthorized document, which we will grant.

of such an agreement, the application can be processed through analysis and comment based on those known objectives while the negotiations continue. With respect to the Department of Justice, the Joint Applicants state that there is no reason to believe that DOJ cannot follow its normal practice of conducting its analysis of the proposed Alliance and making its views known during the course of the Department's proceeding, without the need for a stay. In their response to the other answers, the Joint Applicants emphasize that the decisional issue is whether the proposed Alliance meets certain public interest criteria, not whether all U.S. carriers will be fully satisfied with the new agreement, although the Department is well aware of their interests and will not conclude an unsatisfactory agreement. The Joint Applicants also consider NACA's proposal to withhold approval of the application until new U.S. carrier service in the markets has been established for a period of time to be unwarranted, inconsistent with the treatment of other alliances, and unjust.

B. Decision

Upon a full consideration of the pleadings and other factors, we have decided to deny Delta's motion to the extent that it seeks deferral of all formal procedural dates in the various dockets pending execution and/or implementation of an Open-Skies agreement with the U.K. or pending receipt of the recommendations of the Department of Justice. We will treat the remainder of Delta's requests as discussed below.

We conclude that it is in the public interest in this instance to commence processing the various applications related to the proposed Alliance agreement through orderly public procedures, even though the negotiation of a requisite Open-Skies agreement is still under way. This partial "parallel tracking" of administrative review and bilateral negotiations is justified by the circumstances of this case, discussed below, as well as consistent with the request of Delta, United, and other carriers for an investigation of the competitive implications of the proposed Alliance. Most significantly, however, this procedural decision reflects no change in our substantive policy, which we reaffirm here, *i.e.*, that the completion of an Open-Skies agreement is one necessary precondition to any decision to grant approval and immunity, even tentatively, to a proposed alliance, which must also be found to be procompetitive.

In reaching this decision on the motion, we have considered the possible risks to interested parties and the Department of proceeding, with all the burdens of a complex case, before finalization of an Open-Skies agreement, an essential prerequisite to a decision on the merits of the applications. However, we view this risk to be outweighed by a number of considerations. First, as the motion's supporters all recognize, the importance and complexity of the issues, the likely size of the record, and the number of parties expected to participate all suggest that this application will be difficult to process in a timely manner.

Moreover, as most of these parties have acknowledged, there is a clear need to assure *de facto* competitive access to Heathrow Airport. This will likely require us to administer an allocation of slots among interested U.S. carriers through additional procedures, a step not necessary in previous alliance cases. In addition, the proposed Alliance has already generated substantial controversy. We believe that we will benefit from providing interested parties with the opportunity to give us their views formally on the factual and legal issues presented by the Alliance. Under these circumstances, we see no benefit to delaying a public examination of airport access and other important competitive questions until an Open-Skies agreement is executed.

We will ultimately reach a decision in this proceeding as to whether the application is both procompetitive and in the interests of U.S. consumers. Nonetheless, the timing factors which affect the processing of this case must be weighed together with our strong desire to avoid undue delay in providing the substantial public benefits of implementing an Open-Skies regime. Should Open Skies with the U.K. become a reality, a major improvement in transatlantic, as well as U.S.-U.K. aviation, will result. The usual benefits of Open Skies would be particularly pronounced given the size and geographic significance of the U.S.-U.K. market, and its current restrictive nature. Should Open Skies be achieved, we believe that carriers and consumers should be afforded the opportunity to take full advantage of these benefits as quickly as possible.

At the same time, we do not share the premise of Delta and its supporters that the burden on the Department and on interested parties of proceeding at this time is undue because Open Skies is not yet a reality. As noted by the Joint Applicants, analysis of the potential impact of the Alliance must presume the existence, *de jure* and *de facto*, of an Open-Skies agreement meeting U.S. objectives.[9] These objectives, moreover, are not obscure or uncertain. The U.S. has made it clear in a number of fora and on numerous occasions, including specifically in the text of its numerous Open-Skies agreements in Europe, what it considers to be the essential elements of an Open-Skies agreement. In addition, we have made it clear that *de facto* Open Skies must include adequate provision for new and expanded U.S. carrier service through London-Heathrow airport, and that the ability of U.S. carriers to provide such service notwithstanding the constraints at Heathrow is a critical consideration in the Department's evaluation of the proposed Alliance.

Delta and its supporters have themselves recognized the appropriateness, if not the necessity, of proceeding with an investigation of the proposed Alliance without awaiting an Open-Skies agreement. As discussed above, on October 9, 1996, United filed a motion in Docket OST-96-1850 requesting that the Department institute an immediate formal investigation of the then recently-announced Alliance, gathering

---

[9] Consolidated answer of the Joint Applicants to Delta's motion, at 2-3.

data and inviting comment from all interested parties. Delta and TWA answered in support of the motion. As in the case of its motion in Docket OST-97-2058, Delta noted merit in an investigation of the "competitive implications" and the "competition and policy issues" of the proposed Alliance, although it considered the "issue of antitrust immunity" to be premature since a formal application had not been filed with the Department.[10] It is precisely such issues that we must address in processing this application.

The supporters of Delta's motion to defer procedural dates seem to be largely concerned that beginning procedural consideration of the application before Open Skies is agreed might lead to a premature decision on the merits of the proposed Alliance. We remain firm that Open Skies and the existence of *de facto* Heathrow access remain among the necessary prerequisites to any possible grant of antitrust immunity in this case; without an initialed Open-Skies arrangement, we will not contemplate even tentative approval of the captioned applications.

Similarly, we see no reason to defer procedural dates until recommendations are made available by the Department of Justice. DOJ has been engaged in evaluating the competitive impact of the proposed Alliance. In July 1996, it issued a Civil Investigative Demand requesting information from the Joint Applicants. No showing has been made that the practice in previous alliance cases is inadequate here: the Department will take full account of DOJ's analysis and recommendations in a fashion that will allow all parties to have an opportunity to respond on the record.

Delta also requested that interested parties be given a minimum of 45 days following grant of access to the confidential information submitted by the Joint Applicants in order to comment on the proposed Alliance and other applications, and that common procedural dates be established for the various dockets. We will consider these requests at such time as we establish further procedures and procedural dates.

VI. TWA's Motion to Dismiss Related Applications

On January 22, 1997, TWA filed a motion to dismiss the exemption, certificate/permit, and code-share authority applications in Dockets OST-97-2054, 2055, 2056, and 2057 on the grounds that they are premature and that there is a lack of adequate specificity. The Joint Applicants filed an answer in opposition. In their answers to Delta's motion, Continental, Northwest and ALPA endorsed dismissal of all related dockets as an alternative to a lengthy deferral of procedural dates, while TWA argued that prompt dismissal of the authority applications would simplify consideration of the primary Alliance issues.

---

[10] Answer filed October 21, 1996, in Docket OST-96-1850, at 2-3.

We will deny TWA's motion because, for the reasons discussed above, we reject TWA's premise that the applications are premature until an Open-Skies agreement is in place. As noted by the Joint Applicants in their answer, these applications are predicated on the existence of an Open-Skies regime; the authority requested will not be granted absent that essential precondition.

TWA also contends that the code-sharing authority requested is overbroad because it exceeds specific code-share operations proposed by the Joint Applicants and because it includes countries for which there is no third-country carrier code-share authority available. According to TWA, granting authority in such markets could give the Alliance an advantage if subsequently granted third country carrier code-share rights are limited. Such issues should be addressed in the context of the relevant applications and TWA will be given an opportunity to do so.

ACCORDINGLY,

1. We deny the Motion of Delta Air Lines to Stay Further Procedures in Dockets OST-97-2054 through 2058;

2. We deny the Motion of Trans World Airlines to Dismiss in Dockets OST-97-2054 through 2057;

3. We dismiss the Motion of United Air Lines in Docket OST-96-1850 to the degree inconsistent with this Order; and

4. We grant the Joint Motion of American Airlines and British Airways in Dockets OST-97-2054 through 2058 for Leave to File an Otherwise Unauthorized Document.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document will be made available on the World Wide Web at: http://www.dot.gov/dotinfo/general/orders/aviation.html